U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

(202) 565-5330
(202) 565-5325 (FAX)

Date: July 9, 1998

Case No.: 97 INA 528

In the Matter of

FINANCIAL CONSULTANTS OF AMERICA, INC.,
Employer

on behalf of

JUDY C. AGUILAR,
Alien

Appearance: B. S. Platt, Esq., of Pasadena, California

Before : Huddleston, Lawson and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of JUDY C. AGUILAR ("Alien") by FINANCIAL CONSULTANTS OF AMERICA, INC., ("Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On September 22, 1994, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Lending Activities Supervisor" for this "financial consultant" firm. AF 143. The position was classified as a "Supervisor, Lending Activities," under DOT[2] Occupational Code No. 249.137-034.[3] The Employer described the job duties as follows:

> Supervise and coordinate activities of loan processing department including supervision of loan processors and administrative workers engaged in recording commercial, residential, and consumer loans. Review and authorization of corrections to loan records and administration of new lender approvals. Oversee loan packaging and submissions. Liaison with Filipino clients to solicit new business and verify foreign documents in the Tagalog language.

AF 87 at Item 13. The minimum education for a worker to perform satisfactorily the job duties described in Item 13 of ETA Form 750A was a baccalaureate degree with the Major Field of Study in accounting, management or a related area. The experience requirement was five years in the Job Offered or five years in the Related Occupation of Senior Loan Processor. The Other Special Requirements were (1) "Must speak, read and write Tagalog," and (2) "Real Estate Sales License required." *Id.*, at Items 14 and 15.[4]

The Alien, a national of the Philippines, graduated from the University of Philippines with a baccalaureate degree majoring in Management in 1985. She said she was fluent in English and Tagalog, and had a real estate license since 1993. AG 145. After college graduation, the Alien worked for successive employers as a Junior Processor from December 1986 to September 1988, and as a Senior Loan Processor from October 1988 to February 1991. From March 1991 to the date of application the Alien simultaneously was self-employed as the proprietor of Universal

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

[3] 249.137-034, **Supervisor, Lending Activities** (financial) Supervises and coordinates activities of workers engaged in processing and recording commercial, residential, and consumer loans: Answers workers' and customers' questions regarding procedures. Reviews and authorizes corrections to loan records. Supervises MORTGAGE LOAN PROCESSOR (financial) 249.362-022; MORTGAGE LOAN CLOSER (financial) 249.362-018; CLERK-TYPIST (clerical) 203.362-010; and others. Performs other duties as described under SUPERVISOR (clerical) Master Title. Workers who supervise loan collection are classified under SUPERVISION, CREDIT AND LOAN COLLECTIONS (C clerical) 241.137-010. GOE: 07.01.02 STRENGTH: S GED: R4 M3 L4 SVP: 8 DLU: 88.

[4]The hours were 9:00 to 6:00 in a forty hour week at $60,000 per year.

Processing Center and worked for the Employer as a Senior Loan Processor. AG 146, 149. Although three U. S. job applicants responded after this position was advertised and posted, none of them was hired. AF 86, 106-107, 121-130.

Notice of Findings. Subject to the Employer's rebuttal under 20 CFR § 656.25(c), the CO denied certification in the Notice of Findings ("NOF") dated December 23, 1996. AF 81-85. (1) Citing 20 CFR §§ 656.50, 656.20(c)(4), and 656.20(c)(8),the CO found that the Employer failed to offer sufficient evidence to establish that it offered a current job opening consisting of permanent, full time employment exists to which U. S. workers can be referred.[5] (2) Citing 20 CFR § 656.21(b)(2)(i)(C), the CO found that the Employer had failed to offer sufficient evidence to justify its special job requirement of fluency in the Tagalog language. (3) Citing 20 CFR § 656.24(b)(2)(ii), the NOF first discussed the standards under which the job qualification of U. S. workers are weighed under the Act and regulations, and then the CO said the Employer's rejection of Mr. Diaz was contrary to the Act and regulations.[6] Based on the deficiencies discussed at length in the NOF, the CO questioned the *bona fides* of the Employer's recruiting and described the evidence that the Employer was required to file in rebuttal by way of corrective action as to all of the issues noted. AF 82-85.

Rebuttal. The Employer's January 21, 1997, rebuttal consisted of a statement by its Director and a series of supporting documents. AF 07-80. In discussing the existence of bona fide, permanent, full time employment, the Director said he was a real estate broker and that he employed licensed real estate agents as loan representatives. These agents were considered independent contractors. He explained that the Alien was hired by him on the same basis, but later was terminated because she could not lawfully be employed.[7]
No further evidence was offered in response to the NOF directions. (2) Addressing the foreign language requirement, the Director said its business volume among Filipino customers was reduced by the loss of the Alien's services due to her fluency in Tagalog. (3) The Director then denied that Employer had rejected any of the applicants because of the language qualification and disputed the CO's finding that Mr. Diaz was qualified for the job.

Final Determination. On February 21, 1997, the CO denied certification in the Final Determination. AF 04-06. The CO referred to the finding in the NOF that this occupation

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[5]20 CFR § 656.50 was recodified as 20 CFR § 656.3.

[6]Under 20 CFR § 656.21(b)(2)(ii), the CO must consider a U. S. worker qualified for the job if by education, training, experience, or a combination of these the worker is able to perform the duties of the occupation as these are customarily performed by other U. S. workers similarly situated. The other regulations governing this issue include §§ 656.20(c)(8) and 656.21(b)(6)..

[7]While this account was not consistent with the representations in the Alien's statement of her own qualifications and work history in Form ETA 750B, the rebuttal did not offer anything further to explain the Alien's relationship to the Employer.

normally does not require a foreign language, and that including it as a job requirement is a violation of 20 CFR § 656.21(B)(2)(i)(C) unless Employer proved the foreign language to be a customary requirement for the occupation in the United States. After this summary of the NOF and the rebuttal, the CO said that the Employer's evidence in support of the business necessity of fluency in Tagalog was unsubstantial. While acknowledging that Southern California was a multi-national, multi-ethnic geographic area, the CO found that Employer's evidence failed to support its argument that Filipinos living in that market were more favorably disposed to doing business with someone who spoke both English and Tagalog. The CO noted, moreover, that the Employer did not offer evidence to support the contention that prospective Filipino customers in this region did not understand the English language. As the Employer failed to sustain its burden of proof, the CO denied certification on grounds that the Employer failed to rebut the finding in the NOF under 20 CFR § 656.21(b)(2) that the job description contained a foreign language requirement that was not supported by proof of business necessity.

Appeal. Following the denial of certification, on March 19, 1997, the Employer requested review of the Final Determination, and it later submitted a brief on October 8, 1997. It is significant that the Employer's brief admitted,

> The EMPLOYER at no time claimed that his clients speak exclusively Tagalog or speak no English, but rather that when dealing with large financial investments, individuals to whom English is a second language are more comfortable and most likely to place their business with a company employing someone who can effectively communicate with them in their native tongue.

Brief, p. 6.

Discussion

While an employer may adopt any qualifications it may fancy for the workers it hires in its business, it must comply with the Act and regulations when employer seeks to apply such hiring criteria to U. S. job seekers in the course of testing the labor market in support of an application for alien labor certification. This is particularly the case where, as in this application, the employer's hiring criterion conflicts with the explicit prohibition of 20 CFR 656.21(b)(2)(C), a regulation adopted to implement the relief granted by the Act, which provides that the job offer shall not include the capacity to communicate in a language other than English as a hiring criterion unless that requirement is adequately documented as arising from business necessity.

The Board held in **Information Industries**, 88 INA 082 (Feb. 9, 1989)(*en banc*), that proof of business necessity under this subsection requires the employer to establish that (1) the foreign language requirement bears a reasonable relationship to the occupation in the context of its business and (2) the use of that foreign language is essential to performing in a reasonable manner the job duties described in its application for alien labor certification. In proving the first

prong of this test, it is helpful to show the volume of the employer's business that involves foreign language speaking customers or its business usage of that language. This is demonstrated with proof as to the customers, co-workers, or contractors who speak the foreign language and the percentage of the employer's business that involves that language. In the context of the instant case, the second prong invites evidence that the employee communicates or reads in the foreign language while performing the job duties.

Business necessity is not proven under the first prong where the percentage of customers who speak the foreign language is small. **Felician College**, 87 INA 553 (May 12, 1989)(*en banc*). That share of employer's affected business must equal a percentage that is significant. **Raul Garcia, M.D.**, 89 INA 211 (Feb. 4, 1991). In **Washington International Consulting Group**, 87 INA 625 (Jun. 3, 1988), however, the Board held that a foreign language was not a necessity where only twenty-three per cent of the client base was affected by the employer's foreign language requirement. Both prongs of the **Information Industries** test must be met, however. Simply proving that a significant percentage of the employer's customers speaks the foreign language is not sufficient to establish business necessity under this subsection, unless the employer also proves the existence of a relationship between the customers' use of that foreign language and the job to be performed.[8]

The CO's reasoning in the instant case was reviewed with the holdings in precedents cited above. The Employer did not persuade the CO because its argument as to its business necessity for a Supervisor, Lending Activities, fluent in written and spoken Tagalog turned entirely on the Director's assertions of facts that were unsupported by objective evidence. After examining the Appellate File the Panel agrees that the Employer's rebuttal evidence failed to meet its burden of establishing business necessity because the documentation is vague and incomplete. **Analysts International Corporation**, 90 INA 387 (Jul. 30, 1991). The written statements by the Employer could be accepted as documentation, if they were reasonably specific and indicated their sources or bases. The CO is not required to accept as credible or true the written statements Employer has supplied in lieu of independent documentation, but in considering them must give Employer's statements the weight they rationally deserve. The bare assertions that Employer's statements offered without supporting evidence were insufficient to carry its burden of proof in this case. **Gencorp**, 87 INA 659 (Jan.13, 1988)(*en banc*); and see **Our Lady of Guadalupe School**, 88 INA 313 (Jun. 2, 1989); **Inter-World Immigration Service**, 88 INA 490 (Sep. 1, 1989), and **Tri-P's Corp.,** 88 INA 686 (Feb. 17, 1989).

Although Employer ostensibly complied with the directions to file evidence supporting its position on the issues the NOF raised in this case, the CO explained that the facts sought were not

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[8] In **Coker's Pedigree Seed Co.**, 88 INA 048 (Apr. 19, 1989)(*en banc*), and in **Hidalgo Truck Parts, Inc.**, *supra*, business necessity was established by evidence of significant customer dependence on Spanish-speaking employees. In **Splashware Company**, 90 INA 038 (Nov. 26, 1990), where the employer did show that a significant percentage of its clientele spoke the foreign language, the Board found that business necessity was not proven because no relationship was proven between the customers' use of the foreign language and the job to be performed.

proven by the Employer's vague assertions in which it offered no specific examples and limited itself to general statements that appeared unconnected with tangible data. Moreover, the proof offered in this case failed to demonstrate a frequent and constant need to communicate in a foreign language in business transactions that was sufficient to affect the performance of the worker's duties as a Supervisor, Lending Activities. Compare **International Student Exchange of Iowa, Inc.**, 89 INA 261 (Apr. 30, 1991), *aff'd*, 89 INA 261 (Apr. 21, 1991)(*en banc*)(*per curiam*). At best, the Employer has shown that fluency in Tagalog meets the convenience of the Employer's prospective customers, to whom English is a second language. While some of the people whose business the Employer seeks may be "more comfortable" in dealing with a bilingual real estate agent, this is insufficient to support a finding of the business necessity for a foreign language requirement. **Weidner's Corp.**, 88 INA 097 (Nov. 3, 1988)(*en banc*).[9]

It follows that the conclusion of the Certifying Officer that the Employer failed to establish that it is not feasible to hire a U. S. worker without the foreign language stated by the job description of its application was supported by the evidence of record and the denial of alien labor certification should be affirmed.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

[9] This holding was more recently explained in **Holy Trinity Polish Mission**, 95 INA 288(Dec. 24, 1996).

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.